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In The

Supreme Court of the United States

October Term, 1987

JOINT BOARD OF CONTROL OF THE FLATHEAD, MISSION AND JOCKO IRRIGATION DISTRICTS,

Petitioner,

v.

CONFEDERATED SALISH AND KOOTENAI TRIBES OF THE FLATHEAD RESERVATION,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

AMICUS CURIAE BRIEF OF STATE OF MONTANA

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AMICUS CURIAE BRIEF OF STATE OF MONTANA

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The State of Montana respectfully submits a brief *amicus curiae* pursuant to S. Ct. R. 36.4.

STATEMENT OF INTEREST

The State of Montana has undertaken a general adjudication of all water rights existing as of July 1, 1973,

within its boundaries. Mont. Code Ann. §§ 85-2-201 to 243 (1987).[1] Such rights consist not only of those arising under state law but also those deriving from federal law. Of principal importance among the latter class are rights deemed federally reserved for the seven Indian reservations located in Montana. *See Winters v. United States*, 207 U.S. 564 (1908). The Flathead Indian Reservation, which was established for the respondent Confederated Salish and Kootenai Tribes pursuant to the 1855 Treaty of Hell Gate (12 Stat. 975 (1859)), is one such reservation. The Montana adjudication, along with Arizona's, gave rise to *Arizona v. San Carlos Apache Tribe*, 463 U.S. 545 (1983), which held that various actions initiated in federal court by the United States or tribes seeking to adjudicate Indian federally reserved rights were properly stayed or dismissed to prevent the duplication of effort and possible conflict attendant to concurrent state and

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[1]Montana's efforts to secure a comprehensive water rights adjudication began with adoption of its 1972 Constitution. Mont. Const. Art. IX, § 3(4). In 1973, its Legislature enacted legislation which provided for a general adjudication, by drainage, of all streams in the state through a series of lawsuits to be filed by the Montana Department of Natural Resources and Conservation. 1973 Mont. Laws, ch. 452. Six years later this legislation was substantially revised and now provides for a single, state-wide adjudication. 1979 Mont. Laws, ch. 697. The 1979 law also created a specialized court, known as the Water Court, to carry out the adjudication and the Montana Reserved Water Rights Compact Commission whose purpose is to negotiate with the United States and Indian tribes over claims to federally reserved water rights. See Mont. Code Ann. §§ 3-7-101 to 502, 85-2-701 to 703. During pendency of Commission negotiations, the Water Court proceeding is suspended as to those rights subject to such negotiations. Mont. Code Ann. §§ 85-2-217, 85-2-704(1).

federal proceedings.[2] On remand from *San Carlos*, the Court of Appeals chose to stay the district court proceedings until conclusion of the Montana general adjudication. *Northern Cheyenne Tribe v. Adsit*, 721 F.2d 1187 (9th Cir. 1983).

San Carlos left unresolved the issues of whether the Montana and the Arizona courts possessed jurisdiction under state law to resolve claims over the federally reserved water rights and whether their adjudications were otherwise adequate to determine such rights. 463 U.S. at 570 n.20. The Montana and Arizona Supreme Courts thereafter addressed these issues and found that jurisdiction over these rights was not disclaimed under state law and that the involved statutory schemes were facially adequate to decide the federal claims. *State ex rel. Greely v. Confederated Salish and Kootenai Tribes*, 712 P.2d 754 (Mont. 1985); *United States v. Superior Court*, 144 Ariz. 265, 697 P.2d 658 (1985). The Montana adjudication thus

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[2]Seven actions were initiated in the United States District Court for the District of Montana over a four-year period which led to the Court of Appeals' decision, *Northern Cheyenne Tribe v. Adsit*, 668 F.2d 1080 (9th Cir. 1982), reversed in *San Carlos. Northern Cheyenne Tribe v. Tongue River Water Users Ass'n*, No. CV-75-6-BLG (filed Jan. 30, 1975); *United States v. Tongue River Water Users Ass'n*, No. CV-75-20-BLG (filed March 7, 1975); *United States v. Big Horn Low Line Canal*, No. CV-75-34-BLG (filed April 17, 1975); *United States v. Aasheim*, No. CV-79-40-BLG (filed April 5, 1979); *United States v. Aageson*, No. CV-79-21-GF (filed April 5, 1979); *United States v. AMS Ranch, Inc.*, No. CV-79-22-GF (filed April 5, 1979); and *United States v. Abell*, No. CV-79-33-M (filed April 5, 1979). The last of these cases, *United States v. Abell*, was brought by the United States on its own behalf and as trustee for the respondent Tribes and sought adjudication of surface and ground water rights within the Flathead River basin which includes the entirety of the Flathead Indian Reservation.

continues although, with two exceptions, all federally reserved rights are presently in negotiations with the Reserved Water Rights Compact Commission.[3]

Montana accordingly has a direct interest in maintaining the integrity of its general water adjudication. It has invested substantial resources in the state adjudication process and has opposed attempts since *San Carlos* to seek determination in a federal forum of issues more properly resolved in Water Court proceedings.[4] Insofar

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[3]The exceptions are the Assiniboine and Sioux Tribes of the Fort Peck Indian Reservation which reached a compact with the Commission in 1985 (Mont. Code. Ann. § 85-20-201) and the Blackfeet Tribe which has not yet entered into formal negotiations with the Commission. Negotiations are ongoing between the Commission and the respondent Tribes.

[4]As the Court of Appeals opinion below indicates, the present controversy developed during the 1986 irrigation season, but similar disputes arose in 1985 and 1987. (Pet. App. A-65.) The 1985 action, eventually dismissed as moot, was initiated by the respondent Tribes, and Montana intervened as a defendant for the sole purpose of contesting the District Court's authority under *San Carlos* to resolve the Tribes' request for determination of their claim to an instream flow right for fisheries. *Confederated Salish & Kootenai Tribes v. Flathead Irr. & Power Project*, 616 F. Supp. 1292 (D. Mont. 1985). Montana similarly sought intervention as a defendant in the 1987 action filed by the petitioner, which challenged the 1987 Flathead Indian Irrigation Project operating procedures on various grounds, again for the exclusive purpose of contesting the District Court's authority to determine the parties' respective water rights. The 1987 action was dismissed in an unreported decision because of the petitioner's failure to exhaust administrative remedies, and Montana's intervention motion was denied as moot. *Joint Board of Control v. United States*, No. CV-87-105-M-CCL (D. Mont. July 21, 1987), *appeal docketed*, No. 87-4106 (9th Cir. Aug. 20, 1987). Montana did not request intervention in the 1986 District Court proceeding at issue here because, as framed, the complaint did not seek adjudication of water rights but instead alleged only breach of fiduciary, statutory, and constitutional obligations associated with adoption of that year's irrigation operating procedures. (Pet. App. A-48.)

as the first question presented by the petition herein[5] raises an issue directly governed by *San Carlos*, Montana has a focused and long-standing interest in whether a writ of certiorari is granted to review it.[6]

ARGUMENT

REVIEW OF THE McCARRAN AMENDMENT QUESTION IS PREMATURE SINCE NEITHER THE DISTRICT COURT NOR THE COURT OF APPEALS HAS CONCLUSIVELY DETERMINED THAT ISSUE.

The District Court expressly disclaimed any intention to adjudicate "the priority or quantity of legal rights to the waters of the Flathead Indian Reservation." (Pet. App. A-43.) The court later reiterated this disclaimer by stating that its opinion should not be viewed as establishing "precedent for any party's use in the state of Montana's water adjudication process. The purpose of this decision is to provide interim guidance to the [Bureau of Indian Affairs], the Tribes, and the [petitioner] until a final adjudication of water rights is made." (Pet. App.

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[5]That question reads: "Does the determination of the Court of Appeals requiring the district court to adjudicate the priority and quantification of an Indian aboriginal claim to water violate the federal policy embodied in the McCarran Amendment and decisions of this Court entered thereunder when there is a valid and ongoing state water adjudication process which is adequate to determine water rights claims at issue and in which the Indian tribe is presently participating?"

[6]Montana takes no position with respect to the second question presented in the petition. That question raises the issue of whether the petitioner's exclusion from the administrative process of setting minimum reservoir pool levels and instream flow amounts effects a taking of property without due process of law.

A-44.) Relying principally on 25 U.S.C. § 381 and 25 C.F.R. § 171.1 (1987), the District Court concluded that the Bureau of Indian Affairs had breached its duty to consult with the petitioner before formulating the Flathead project's 1986 water management plan. (Pet. App. A-57.) It therefore found proper issuance of a preliminary injunction to enjoin implementation of that plan. (*Ibid.*) In later *dicta* the court commented that, while it was "not so much concerned with the Bureau's ultimate specific decisions pertaining to administration of the Flathead Irrigation Project, as I am interested in the manner in which such decisions are reached[,] . . . '[j]ust and equal distribution' is a guiding principle for project management." (Pet. App. A-60.)

The Court of Appeals reversed, reasoning that the District Court's reference to a "just and equal distribution" requirement contained two assumptions, the first of which may be and the second of which is incorrect: (1) the competing water claimants have equal priority dates, and (2) 25 U.S.C. § 381 and 25 C.F.R. § 171.1 apply to the respondent Tribes' claims for instream flows to maintain fisheries. (Pet. App. A-66 - A-67.) It accordingly found "colorable," but did not resolve, the respondent Tribes' claim that its instream flow rights possess an aboriginal or "time immemorial" priority which would clearly antedate any irrigation right priority; it then wholly rejected the District Court's reliance on 25 U.S.C. § 381 and 25 C.F.R. § 171.1 as requiring the Bureau of Indian Affairs to consult with the petitioner before adopting annual irrigation flow procedures since "those provisions imposed duties upon the BIA in maintaining the Project's *irrigation* water in fairness to all irrigators . . . [and] do not deal at all with the BIA's duty in helping the

Tribes to protect their prior and paramount fishing water rights." (Pet. App. A-68, A-69) (emphasis in original). The Court of Appeals therefore vacated the preliminary injunction, stating that, although "[w]e do not suggest that the [district] court is required to make any . . . general adjudication or quantification in the course of these proceedings[,] . . . the preliminary injunction under review, and the principle established for future irrigation years by the district court's opinion, fail to accord potentially superior tribal fishing rights the protection that federal law gives them against claims and considerations of junior appropriators." (Pet. App. A-70.)

Both opinions below evince concern over determining through federal court proceedings issues which are otherwise subject to resolution in the Montana general water adjudication. Such concern is clearly justified not only by the arguably *res judicata* effect of *San Carlos* as to the appropriate forum for adjudication of the respondent Tribes' reserved rights but also by the more general abstention principles underlying that decision and *Colorado River Water Conservation District v. United States*, 424 U.S. 800 (1976). Consistent with this concern, the Court of Appeals decision does not require the District Court to adjudicate either the existence of an instream flow right alleged to arise under the Hell Gate Treaty or the priority date of such right *unless* the latter court determines to issue substantive relief concerning the proper allocation of Flathead project waters. The Court of Appeals thus im-

plicitly left for consideration on remand the question of whether abstention is proper.[7] Should this matter proceed further before the District Court, Montana will seek intervention to argue, as it did in 1985 and 1987, that *San Carlos* dictates presentation of the dispute to the Water Court for resolution.[8]

Finally, it must be emphasized that, with respect to the McCarran Amendment question, the petitioner largely

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[7]The District Court rejected the United States' argument below that exercise of federal jurisdiction should be deferred to the Water Court in accordance with *San Carlos*. (Pet. App. A-37 - A-38.) The court's rejection, however, must be viewed in the overall context of its decision which sought to resolve the controversy on essentially procedural grounds—i.e., on the basis that the 1986 irrigation plan was defective insofar as the petitioner had not been consulted prior to adoption. How the District Court will rule upon the abstention question in light of the Court of Appeals' opinion and the former's emphatic refusal to adjudicate "the priority or quantity of legal rights to the waters of the Flathead Irrigation Project" (Pet. App. A-43) remains an open issue. The Court of Appeals obviously recognized the District Court's sensitivity to *San Carlos* and, just as obviously, did not intend to foreclose that court from abstaining on remand. Indeed, had the Court of Appeals summarily held otherwise, palpable conflict with *San Carlos* would have arisen.

[8]While not directly relevant for instant purposes, the District Court's statement that "there is no state forum available at this time for the parties to air their differences over water management problems existing on the Reservation" (Pet. App. A-38) is erroneous to the extent it suggests the Water Court lacks present authority to determine issues relating to the substantive rights of the parties to the use of water. As noted above, adjudication of federally reserved rights subject to ongoing negotiations with the Montana Reserved Water Rights Compact Commission is suspended pending the outcome of those negotiations. Despite such suspension the Water Court is vested with authority under Mont. Code Ann. § 85-2-231(1)(d) to issue interlocutory decrees "necessary to the orderly administration of water rights prior to the issuance of a preliminary decree." Furthermore,

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controls its own destiny. Because the action below was filed by it, the petitioner may request dismissal under Fed. R. Civ. P. 41 and, if the 1988 irrigation water management plan presents allocation problems similar to those in 1986 and 1987, initiate a Water Court proceeding to vindicate its claimed rights. The Court of Appeals decision therefore has little practical effect on the petitioner as to this question, and the lack of such effect eviscerates any contention that it is substantial.

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CONCLUSION

The State of Montana respectfully requests that the petition be denied as to the first question presented.

Respectfully submitted,

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because a Water Court judge also serves as a district court judge for each judicial district wholly or partially within his Water Court division (Mont. Code Ann. § 3-7-201(3)), he is empowered under Mont. Code Ann. § 85-2-406(2) to grant "such injunctive or other relief which is necessary and appropriate to preserve property rights or the status quo pending the issuance of [a] final decree."